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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Filed May 27, 1963

Civil Action No. 4771-Civ-J

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO., PLAINTIFFS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

AGREED STATEMENT OF THE CASE ON APPEAL, PURSUANT TO RULE 76.

The Interstate Commerce Commission, appellant, and the Atlantic Coast Line Railroad Company, et al., appellees, hereby stipulate and agree for the purpose of this appeal solely on the jurisdictional questions by the Interstate Commerce Commission to the United States Court of Appeals for the Fifth Circuit, as follows:

1. On May 20, 1946, Thomson Phosphate Company, hereinafter Thomson or the shipper, filed with the Com-

mission an informal complaint No. 174417 alleging that certain rates on unspecified shipments "during the past two years," as supplemented on December 4, 1947, to add "during the pendency of this proceeding," of ground phosphate rock from Prairie, Florida, to destinations in the State of Illinois were unreasonable, and requested reparation or reimbursement of the transportation charges to the extent they were unlawful. After correspondence and other informal proceedings, the railroads made a reparation payment of $13,071.98 in November 1950, pursuant to Commission order of September 19, 1950, in Special Docket 218792. Thereafter Thomson filed a formal complaint with the Commission on October 14, 1952, in Docket No. 31124, which resulted in an award of reparation to the shipper. *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I.C.C. 1 (1953), 293 I.C.C. 369 (1954). This further award of $1,463.80 was paid to Thomson by the appellees on October 5, 1955, by check reading "payment in full of all matters in Informal Complaint 174417."

2. After an additional exchange of correspondence, in which the Railroads contended that the matter was closed and the claims were barred by § 16(3) of the Interstate Commerce Act and I.C.C. Rule 25, and other details, Thomson filed a further formal complaint on October 16, 1956, in Docket No. 32065, alleging that the rates on about 636 shipments of ground phosphate rock from Prairie, Florida, to over 100 destinations in Illinois in the period April 10, 1945, to December 31, 1950, were unjust and unreasonable, and requested reparation. After various proceedings, the Commission issued a report finding that the assailed rates were unjust and unreasonable and that the shipper was entitled to reparation. *Thomas Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 303 I.C.C. 25 (1958). Upon request of Thomson, when appellees refused to certify the shipper's statements showing the shipments made in the past period, the Commission reopened the proceeding for a determination of the amount of reparation due. After additional proceedings,

the Commission issued a report on September 28, 1960, 311 I.C.C. 315, finding that the shipper was entitled to reparation of $8,889.76 with interest, and entered an order authorizing and directing appellees to pay such sum on or before December 1, 1960. One Commissioner dissented, holding that the claims were barred. The latter order, having been stayed pending reconsideration, was modified by the Commission in an order of July 13, 1961, so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of the earlier order.

3. Appellees filed their complaint in the District Court on September 6, 1961. The Commission's reports and orders were not stayed pending the appeal. Appellees have not paid to Thomson the reparation of $8,889.76 and interest awarded by the Commission. Thomson did not intervene or enter any appearance in the court below, although its counsel had notice of the proceeding and was entitled to participate.

4. The appellant Commission filed a motion to dismiss the complaint on the grounds that the Commission had not issued a final order which was appealable to court, and that the Court lacked jurisdiction or the Court should dismiss in the exercise of a sound equitable discretion. On May 15, 1962, after briefs and oral argument, the District Court entered an order denying the motion to dismiss the complaint. These same issues are the basis of this appeal to the Court of Appeals.

5. On August 22, 1962, Thomson, a corporation which was legally dissolved in *1951*, filed suit against appellees and other railroads pursuant to section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2), in the United States District Court for the Southern District of New York for the sum of $8,889.76, together with interest thereon, costs, and an attorney's fee. These papers were served on the Railroads on August 28, 1962. It has been stipulated to hold the New York case in abeyance pending the outcome of the Florida case.

6. Following briefing and oral argument on November 19, 1962, the District Court at Jacksonville (M.D. Fla.) on January 9, 1963, entered judgment for appellees, with findings of facts and conclusions of law reaffirming that the Court had jurisdiction to review the reports and orders of the Commission herein, and deciding that the same are unlawful and should be set aside because the claims were barred by the statute of limitations and for other reasons, 213 F. Supp. 199.

7. On March 11, 1963, appellant filed its notice of appeal in the District Court, and on April 17, 1963, the Clerk of the Court of Appeals received from the Clerk of the District Court the certified original papers comprising the record on appeal.

8. Appellant does not appeal the findings of the District Court on the merits but only appeals the question of jurisdiction. The points to be relied on by the appellant (and opposed by appellees) are:

a. The District Court is without jurisdiction to entertain the complaint of the appellee railroads to review the Commission's decision, since the Commission has not issued a final and binding order against these appellees.

b. The District Court is without jurisdiction to entertain the complaint, since the exclusive method for enforcement and review of the decision is provided in a suit by the shipper under section 16(2) of the Interstate Commerce Act, 49 U.S.C. § 16(2).

c. The District Court abused its equity discretion, if any exists to entertain the complaint, since appellees have a plain and adequate remedy at law.

d. The District Court abused its equity discretion, if any exists to entertain the complaint, in depriving the shipper of the choice of venue granted by the statute.

9. There is attached hereto, and made a part hereof, the following items which shall with this agreed statement constitute the record designated for printing:

a. Report of the Commission decided February 10, 1958, 303 I.C.C. 25.

b. Report of the Commission decided September 28, 1960, except the appendices thereto, 311 I.C.C. 315.

c. Orders of the Commission dated September 28, 1960, and July 13, 1961.

d. Appellees' complaint filed in the District Court on September 6, 1961, except appendices which were the reports and orders (a, b, and c) above.

e. Order of the District Court entered May 15, 1962.

f. Judgment, Findings of Fact, and Conclusions of Law entered by the District Court on January 9, 1963.

g. Appellant's Notice of Appeal, filed in the District Court on May 11, 1963.

h. Thomson's complaint in the United States District Court for the Southern District of New York and attached letter, a copy of which was filed for the information of the Court below and the parties at the hearing held November 19, 1962, by counsel for appellant, except exhibits thereto.

10. The parties on brief or in argument may refer to other portions of the record as to them it may appear appropriate.

Dated this the 22nd day of May, 1963.

/s/ Leonard S. Goodman
Counsel for Appellant

/s/ U. B. Ellis
Counsel for Appellees

Pursuant to Rule 76 of the Federal Rules of Civil Procedure, the foregoing Agreed Statement of the Case on Appeal is hereby approved and is certified as a supplemental record on appeal.

This the 28 day of May, 1963.

/s/ Wm. A. McRae, Jr.
United States District Judge

INTERSTATE COMMERCE COMMISSION

No. 32065

THOMSON PHOSPHATE COMPANY

v.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

Decided February 10, 1958

* * * *

BY DIVISION 2:

The modified procedure was followed, and oral hearing was held for cross-examination of the complainant's witnesses. Exceptions to the report proposed by the examiner and replies thereto were filed by the parties. The conclusions herein differ from those recommended by the examiner. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By complaint filed on October 16, 1956, complainant, a corporation, alleges that the rates charged on numerous shipments of ground phosphate rock, in carloads, from Prairie, Fla., to destinations in Illinois from April 10, 1945, to December 31, 1950, were unjust and unreasonable. Reparation only is sought. During the period involved the complainant was an Illinois corporation dealing in ground phosphate rock used in agriculture, with its principal office in Chicago, Ill. The corporation was dissolved in September 1951, but use of its name as a complainant in this proceeding was permissible under Illinois statutes.

The defendants contend that no reparation can be awarded in this proceeding because all of these shipments moved more than 5 years before this complaint was filed. Section 16(3)(b) of the Interstate Commerce Act requires that complaints against carriers subject to part I of the act for the recovery of damages not based on overcharges must be filed within 2 years from the time the cause of action accrues, and not after. The disposition of this contention depends upon the effect to be given to an informal complaint No. 174417, filed with the Commission by this complainant on May 20, 1946, alleging that rates on ground phosphate rock from Prairie "to all stations in the State of Illinois during the past 2 years" were unreasonable. This complaint was transmitted to the Atlantic Coast Line Railroad Company, hereinafter called the Atlantic Coast Line, the originating carrier.

In a letter dated December 4, 1947, the complainant advised the Commission that its informal complaint "is for reparation on all shipments described herein to all destinations in Illinois during the statutory period, as well as the pendency of this proceeding." A copy of this letter was sent to the Atlantic Coast Line. That carrier wrote the Commission on December 17, 1947, stating that it was willing to consider—

> the question of payment of reparation on all the shipments involved in this informal complaint upon which the statute of limitations has not run, with a view of making reparation by observance of the basis fixed by the Interstate Commerce Commission for reparation purposes in the Diamond Fertilizer Company case * * *. [*Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I. C. C. 75]

Rates were prescribed therein for application on phosphate rock from Florida points, including Prairie, on the bases of 85 percent of the fertilizer scale approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, as to past shipments, on which reparation was awarded, and 75 percent thereof for the future. Among the destinations involved in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co.*, 256 I. C. C. 75, were East St. Louis, Ill., and Indianapolis and Hartsdale, Ind.

Subsequently a special-docket application No. 218792, was filed by the defendants, and, upon consideration thereof, an order was entered on September 19, 1950, directing payment of $13,012.52 to the complainant as reparation on account of unreasonable charges on shipments moved during the period from November 15, 1943, to April 7, 1945. In its letter of December 7, 1950, to the Atlantic Coast Line, acknowledging payment of this reparation, the complainant called attention to the fact that its informal complaint also embraced shipments which had moved after April 7, 1945, and requested reparation thereon. The question whether the complainant was entitled to reparation of these later shipments was the subject of further correspondence between the parties and our secretary, who wrote to the complainant on June 26, 1952, that no further action in the premises would be taken informally, and that if it desired to pursue the matter further, a formal complaint would be necessary.

The complainant filed such complaint No. 31124 on October 14, 1952, assailing rates on ground phosphate rock from Prairie to Bethany, Malta, Paris, Rossville, and Wapella, Ill., which resulted in decisions by division 3, *Thomson Phosphate Co.* v. *Atlantic Coast Line R. Co.*, 291 I. C. C. 1 and 293 I. C. C. 369, awarding reparation. In reply to the complainant's request that the informal complaint be held in abeyance pending a decision in No. 31124, the Commission's secretary stated in his reply of December 24, 1952, that "in accordance with your request, the informal proceeding will be considered reopened." The defendants there contended, as they do herein, that the informal complaint No. 174417, was completely disposed of by the order in special docket No. 218792 on September 19, 1950, and that the filing of the formal complaint in No. 31124 more than 2 years later was too late. Division 3, however, concluded that the filing was timely, pointing out that as to shipments after April 7, 1945, "the informal proceeding was closed on June 26, 1952, without adjustment."

The reparation awarded in No. 31124 was paid on October 5, 1955, by a check enclosed in a letter from the Atlantic Coast Line to the complainant's counsel, stating that it represented "payment in full of all matters involved in Informal Complaint 174417 and I. C. C. Docket No. 31124 growing out of that informal complaint." In acknowledging payment on October 14, 1955, the complainant again referred to the reopening of the informal complaint on December 24, 1957, and requested "adjustment on the shipments to the remaining Illinois destinations through special docket channels * * *." Further fruitless correspondence followed, in the course of which the Atlantic Coast Line asserted that the informal complaint had been terminated by the Commission's letter of June 26, 1952.

Some time later, in a letter dated March 29, 1956, the secretary of the Commission again wrote to the complainant's counsel that the matter involved in the informal complaint "is one not susceptible of adjustment on the Commission's informal docket." However, upon receipt of a letter from the complainant's counsel requesting reconsideration the chief of our section of informal cases wrote to the Atlantic Coast Line on April 4, 1956, stating that the informal docket "is hereby reopened and submitted to you for your further consideration." After additional exchange of correspondence the secretary of the Commission wrote to the complainant's counsel on April 19, 1956, stating that "we are again declining the complaint."

Rule 1.25(f) of our General Rules of Practice provides, among other things, that when an informal complaint seeking damages cannot be disposed of informally the parties will be so notified in writing, and the matter in such complaint will not be reconsidered, unless, within 6 months of such notice, a formal complaint as to such matter is filed or it is informally resubmitted on an additional fact basis. The filing of the instant complaint on October 16, 1956, was seemingly in conformance with the

"six months' rule" if the secretary's letter of April 19, 1956, is regarded as the final declination of the informal complaint. The defendants urge that the informal complaint should be regarded as having been closed either by the secretary's letter of June 26, 1952, or that of March 29, 1956, and that no additional facts were later presented by the complainant after either of those dates to support the purported reopenings of December 24, 1952, or April 4, 1956.

In support of this argument the defendants rely on the decision of division 2 in *LeTourneau-Westinghouse Co.* v. *Southern Ry. Co.*, 299 I. C. C. 17, which dealt with a factual situation somewhat resembling that now before us. On reconsideration, however, 299 I. C. C. 780, the Commission reversed the finding of the division that the complaint was barred. The Commission said, at pages 780 and 781:

> The division concluded that by repeated notices the complainant was fully apprised that the matter was not susceptible of informal adjustment, and that it should have filed the formal complaint within 6 months of the first notice, whereas it failed to file such a complaint within 6 months of the final notice on February 18, 1954. The division further recognized an exchange of correspondence between the parties in May 1955, and a subsequent notice from our secretary, dated July 21, 1955, that the complaint was declined, but decided that the complainant had been on definite notice prior thereto.
>
> We are in complete agreement with the division's observation that the complainant had definite notice that the matter was not susceptible of informal adjustment before the secretary's letter of July 21, 1955. However, we deem important the statements in the letter that the contents of the complainant's latest letters had been given consideration, that the complaint was again declined, and that the complainant's attention was directed to rule 25 (f) of the General Rules of Practice. Thus, the letter implied that the complainant still had 6 months within which to file a formal complaint. In these circumstances, we are of the view that the matter is not barred, and we shall proceed to a consideration of the merits.

The secretary's letter of April 19, 1956, in the instant proceeding was drawn along similar lines. It indicated that the matter was one not susceptible of informal adjustment, and directed the complainant's attention to the appropriate provisions of rule 1.25 (f) of the General Rules of Practice. We consider this letter to have been the final declination and its date to have marked the beginning of the 6 months' period. Accordingly, the complaint is not barred.

The defendants urge also that the complainant is not a proper party to receive a possible award of reparation in this proceeding on two grounds:

(1) The complainant bought the rock which comprised these shipments from the International Minerals and Chemical Corporation, hereinafter referred to as International, which prepaid the freight charges but debited them specifically in the complainant's account. The complainant's prices to the consignees, its customers, who were chiefly farmers, were on a delivered basis. Freight costs among other elements were considered in quoting those prices. Although the freight charges were initially paid by International, they were paid and borne by the complainant within the usual meaning of that term.

(2) In April 1951 International acquired all of the outstanding capital stock of the complainant, which was dissolved in September of that year. As a result of these transactions most of the complainant's assets were taken over by International, but it appears that the claim which is the subject of this complaint was excepted from the transfer, contrary to the assertion of the defendants. This conclusion is substantiated by the fact that the reparation awarded in No. 31124 based on shipments which moved on and between July 5, 1945, and January 11, 1949, was paid to the complainant in October 1955 without objection on the part of International.

Another contention of the defendants is that the filing of this complaint more than 5 years after the complainant was dissolved was in contravention of an Illinois statute reading, in part, as follows:

The dissolution of a corporation * * * shall not take away or impair any remedy available to or against such corporation, its directors, or shareholders, for any right or claim existing or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name.

The instant complaint may be considered as one phase of a proceeding which was commenced by the filing of informal complaint No. 174417 before the dissolution of the complainant corporation. The prosecution of the formal complaint in the name of the complainant was therefore not inconsistent with this statute. See *Chicago Title and Trust Co.* v. *Wilcox Bldg. Corp.*, 302 U. S. 120, 128.

The defendants further urge that the assailed rates have not been shown to be unjust or unreasonable in that the material facts, including the nature of the movements, consignees, destinations, loading, frequency, and the actual commodity and its utilization, are much different from those involved in the decisions cited by complainant as precedents.

The shipments consisted of 636 carloads, which moved to more than 100 destinations throughout Illinois, of which Harrisburg, Carlinville, Champaign, Kankakee, and Rochelle are geographically representative. The average carloading was about 84,000 pounds, substantially the same as that in *Diamond Fertilizer Co.* v. *Aberdeen & R. R. Co., supra.* There, and in *Armour & Co.* v. *Aberdeen & R. R. Co.*, 268 I. C. C. 502, the shipments were to chemical companies at a limited number of points, which manufactured superphosphate or heavy chemicals. Nevertheless in No. 31124 division 3 was guided by those decisions in considering the rates on shipments of ground phosphate rock to farmers at widely scattered points. Its decision included the following:

On average loads for distances of from 1,251 to 1,046 miles, the car-mile yields range from 23.9 to 26.3 cents

from the applicable rates, and would range from 22.6 to 24 cents from the rates sought.

Here it is shown that on average loads to representative points for distances between 1,018 and 1,164 miles, the car-mile earnings ranged from 23.6 to 26.9 cents under the rates in effect on June 30, 1946, compared with a range from 22.9 to 24.2 cents under the basis sought. The circumstances considered by division 3 in reaching its decisions in No. 31124 are indistinguishable from those shown by this record.

We find that the rates assailed were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, *supra*, extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved.

We further find that the complainant made the shipments as described and paid and bore the charges thereon at rates herein found to have been unjust and unreasonable, and was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates herein found to have been just and reasonable, and is entitled to reparation, with interest. The complainant should comply with rule 1.100 of the General Rules of Practice.

REPORT OF THE COMMISSION

Decided September 28, 1960

(Title Omitted)

BY DIVISION 3:

Exceptions to the report and order on further hearing recommended by the examiner were filed by the defendants, and the complainant replied. At the request of the defendants, the parties were heard in oral argument following the hearing before the examiner, in lieu of filing briefs. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In the prior report, 303 I.C.C. 25, decided February 10, 1958, under the modified procedure, in which oral hearing was held for cross-examination of the complainant's witnesses, division 2 found that the rates [1] charged on numerous shipments of ground phosphate rock, in carloads, moved on and between April 11, 1945, and October 21, 1950, from Prairie, Fla., to destinations in Illinois, were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, extended to include distances from Bartow, Fla., and increased as subsequently authorized for application on phosphate rock when the shipments moved. Accordingly, the complainant was found to be entitled to reparation, with interest, on these shipments, in the amount of the difference between the charges paid and those found to have been just and reasonable, and was directed to comply with rule 1.100 of the General Rules of Practice. A petition by the defendants for reconsideration of the findings in the prior report, to which reply was made by the complainant, was denied by the Commission on July 23, 1958.

[1] Rates are stated per ton of 2,240 pounds.

In due course, statements were filed with the defendants by the complainant containing details of the shipments on which reparation is claimed, in compliance with the requirements of rule 1.100. Thereafter, the defendants declined to certify any of the statements, and returned them to the complainant. Upon request of the complainant, the proceeding was reopened for further hearing, solely for the purpose of determining the amount of reparation due under the findings in the prior report.

After a hearing, a recommended report and order were issued, wherein the examiner found that the complainant was entitled to reparation in the total amount of $8,-889.76, with interest, on the shipments of record, listed in appendix A to this report. The defendants were allowed 30 days, however, after service of the examiner's report, in which to make a check as to the accuracy of the amounts of reparation therein specified. Subsequently, a petition for leave to file petition for reconsideration of the findings in the prior report, filed by the defendants, was denied by the Commission on June 23, 1960. Thus, the issue herein is limited solely to a determination of the amount of reparation due the complainant under the findings in the prior report.

The defendants, aside from excepting to the amount of reparation recommended by the examiner, also protest the finding in the prior report and the examiner's recommendation on further hearing that interest be allowed in connection therewith. It is their view that interest is awarded only as a means of compensating complainants for the period of time in which they have been "deprived of the use of their money" and that the complainant here has been deprived thereof, if at all, only because of its own delay in formally processing its reparation claims. In essence, the defendants accuse the complainant of being guilty of laches. The Commission's denial of the defendants' petition for reconsideration of the prior report precludes our further consideration of that matter in this proceeding.

Specifically, the defendants contend that the examiner erred in finding the complainant entitled to reparation in the total amount of $8,889.76, plus interest, and urge that if reparation is to be awarded herein, it should not exceed $8,258.75, without interest. In support thereof, they offer certain alleged corrections in the amounts of reparation to be awarded on some 35 shipments, which would result in a reduction of $125.02 in the total amount of reparation indicated in appendix A to the examiner's recommended report on further hearing. For example, on a shipment of 112,800 pounds of ground phosphate rock shipped to Andres, Ill., in car number NYC 101560 on April 13, 1945, charges of $370.13 were collected based on a rate of 735 cents. In appendix A to his report, the examiner determined that charges of $360.56 should have been assessed, based on a rate of 716 cents, and that reparation should be awarded in the amount of the difference, or $9.57. In their exceptions, the defendants contend that the proper rate under the "75-percent" scale was 725 cents, which would result in charges on this shipment of $365.09, with resulting reparation in the amount of $5.04. The evidence of record indicates that the "75-percent" scale projected to 1,175 miles, the distance to Andres, produced a rate of 716 cents at the time of movement. No justification appears for this and like changes suggested by the defendants. In these circumstances, the defendants' proposed corrections must be rejected.

It is further contended by the defendants on exceptions that the examiner erred in not rejecting reparation claims with respect to 57 shipments, listed in appendix B hereto, which would have effected a further reduction of $505.99 in the total amount of reparation. It appears that these particular shipments had been diverted to destinations other than those originally specified, and that the complainant was unaware of that fact. The defendants urge that this establishes that the complaint had neither paid nor borne the freight charges on these shipments, and is not entitled to reparation thereon. As previously stated,

the issue before us is the determination of the total amount of reparation to be awarded. Division 2 found, in the prior report, that the complainant paid and bore the charges on all the shipments herein, and no reason appears for questioning that finding. Accordingly, the defendants' contention that the examiner erred in recommending reparation on these shipments has no support of record. As pointed out by the complainant, the distances to the actual destinations of these shipments instanced by the defendants are shorter than those to the original destinations designated. Thus, the reparation award recommended, as to these shipments, is at least no less than that warranted by the actual distances.

Upon further hearing, we find that the complainant is entitled to reparation from the defendants in the accompanying order in the amounts set opposite their respective names in appendix C hereto, aggregating $8,889.76, with interest. An appropriate order will be entered.

COMMISSIONER WALRATH, dissenting:

While I agree with the findings of the majority with respect to the limited issues on further hearing, I believe that the complaint is barred by section 16(3) of the act.

ORDER ENTERED SEPTEMBER 28, 1960

(Title Omitted)

This proceeding having been further heard, and full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report on further hearing containing its findings of fact and conclusions thereon, which report, together with the prior report, 303 I.C.C. 25, is hereby referred to and made a part hereof:

It is ordered, That the defendants named in appendix A to the report on further hearing made a part hereof, according as they participated in the transportation, as shown in appendix C to said report, be, and they are hereby, authorized and directed to pay unto the complainant, Thomson Phosphate Company, on or before December 1, 1960, the sum of $8,889.76 with interest thereon at the rate of 4 percent per annum from the dates the unjust and unreasonable charges were collected, as reparation on account of unjust and unreasonable rates charged for the transportation of 639 carloads of ground phosphate rock from Prairie, Fla., to numerous destinations in Illinois, on and between April 11, 1945 and October 21, 1950, all as described in the aforesaid reports.

By the Commission, division 3.

HAROLD D. MCCOY,
Secretary

(SEAL)

ORDER ENTERED JULY 13, 1961

(Title Omitted)

Upon consideration of the record in the above-entitled proceeding, and the order of the Commission, Division 3, dated September 28, 1960, which was stayed pending disposition of the petition for oral argument and reconsideration, which petition was denied by order of the Commission, dated May 23, 1961;

It is ordered, That the said order of Division 3, dated September 28, 1960, be vacated only insofar as it required compliance on or before December 1, 1960, and that said order be modified so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of said order.

By the Commission.

HAROLD D. MCCOY,
Secretary

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
(Jacksonville Division)

Civil Action No. 4771 Civ-J

ATLANTIC COAST LINE R. CO., ILLINOIS CENTRAL R. CO., CHICAGO & EASTERN ILLINOIS R. CO., THE BALTIMORE & OHIO R. CO., CHICAGO, BURLINGTON & QUINCY R. CO., CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO., GULF, MOBILE & OHIO R. CO., THE NEW YORK CENTRAL R. CO., WABASH RAILROAD CO.

vs.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION

COMPLAINT TO ENJOIN, SET ASIDE, AND ANNUL ORDERS OF THE INTERSTATE COMMERCE COMMISSION

I.

Plaintiffs, as set forth above, bring this action against the Interstate Commerce Commission and the United States of America to enjoin, set aside, and annul certain orders dated September 28, 1960, and July 13, 1961, copies attached as Appendix A and B, made by the Interstate Commerce Commission (hereinafter referred to as the Commission) in a proceeding known as Thomson Phosphate Company v. Atlantic Coast Line Railroad Company, et al, Docket 32065, in which printed reports appear at 303 ICC 25 and 311 ICC 315 (copies attached as Appendix C and D). Plaintiffs here were the defendants before the Interstate Commerce Commission.

II

Plaintiffs have exhausted their remedies before the Commission and several petitions for reconsideration have been denied by orders of July 23, 1958, and May 23, 1961.

III

This action arises under, the United States is made a defendant herein, and the jurisdiction of this court rests on, 28 USCA Sections 1336, 1398 and § 17(9) of the Interstate Commerce Act, 49 USCA § 17(9).

IV

This action is properly reviewable by a one-judge District Court instead of a three-judge Court because it involves an order for the payment of money. *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205.

V

Venue exists under 28 USCA § 1398 because Plaintiff, Atlantic Coast Line R. Co., is a corporation under the laws of Virginia, having its principal office at Jacksonville, Fla.

The other Plaintiffs are each corporations having their principal offices in Chicago, Illinois, Baltimore, Md., New York, N.Y., Mobile, Ala., and St. Louis, Mo.

All shipments involved in this proceeding originated on the Atlantic Coast Line R. Co. at Prairie, Fla., and the other Plaintiffs were respectively the delivering carriers on only some of the shipments, as shown in the printed report at 311 ICC 315.

VI

This proceeding involves freight charges on about 636 shipments of ground phosphate rock from Prairie, Fla., to various (over 100) points in Illinois between April 10, 1945, and December 31, 1950.

Complainant before the ICC contended the rates were unreasonable to the extent they exceeded 75 per cent of certain fertilizer rates.

The Railroads contended that the assessed rates were not unreasonable, and further contended:

a) That complainant was barred by the 2 year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 USCA § 16(3) because the shipments all moved prior to December 31, 1950 and the complaint was not filed until October 16, 1956;

b) That complainant and the Commission had failed to observe the requirements of Commission Rule of Practice 25(f) and thus failed to stay the Statute of Limitations;

c) That the informal complaint which the complainant and the Commission relied upon to stay the Statute of Limitations, § 16(3)(b), did not satisfy the Commission Rule of Practice 25(b) in that it did not include the proper details regarding shipments:

d) That the formal complaint filed October 16, 1956, does not satisfy Commission Rule of Practice 29 and thus did not stay the Statute of Limitations;

e) Likewise that it did not satisfy Rule 17(b) regarding signing and verification by an Executive officer;

f) The Railroads submitted that complainant had sold its interest in all claims on shipments moved prior to January 1, 1948, and thus had no right to claim reparations;

g) That complainant did not pay or bear the freight charges and thus was not entitled to recover in any event;

h) That complainant corporation was dissolved in September, 1951, and could not therefore file an action or formal proceeding before the Interstate Commerce Commission in October, 1956;

i) That it was error to award reparations at all, and further error to award interest for all this period of time where a complainant sat back for over 10 years as to some shipments before taking formal action.

VII

The matter was handled by the Commission under Modified Procedure (by affidavits) in 1957. Then hearing for cross-examination of complainant's witnesses took place May 29, 1957.

Thereafter the Examiner of the Interstate Commerce Commission issued his report in August, 1957, finding the claims barred by the Statute of Limitations.

Then on February 10, 1958, a Division of the Commission issued a report (303 ICC 25) ruling against the RailRoads on all points discussed and disregarding others completely. A petition for reconsideration was filed by the railroads and was denied by Commission order of July 23, 1958.

The railroads refused to certify the amount of reparations due and the matter was referred to an Examiner for a further hearing which took place April 27, 1959. After further procedure, a second report of a Division of the Commission issued September 28, 1960 (311 ICC 315) which was adverse to the railroads, but one of the three Commissioners dissented saying the claims were barred by § 16(3). A petition for reconsideration was filed, and denied by order of May 23, 1961.

Oral argument was requested in three separate pleadings, and was always denied.

VIII

The Commission erred in finding the rates assessed unreasonable and in awarding reparations.

IX

The Commission erred in awarding interest.

X

The Commission erred in not finding the claims barred by § 16(3)(b) of the Act.

XI

The Commission erred in not properly applying its Rules of Practice, 17, 25 and 29, the result of which has the substantive effect of improperly staying the statute of limitations, which statute has been judicially construed to destroy the right as well as the remedy.

The Commission erred in allowing prosecution of a complaint or action for damages by a corporation which had sold its alleged claims to another corporation and dissolved itself five years previously.

XIII

The reports and orders of the Commission to the extent that they find the rates assessed unreasonable, award reparations, award interest, fail to find the complainant barred by the 2 year statute of limitations in § 16(3) (b) of the Interstate Commerce Act, 49 USCA § 16(3) (b), and fail to properly apply Commission Rules of Practice 17, 25, and 29 to the proceeding before the Commission,— are unlawful and void and beyond the power of the Commission to make for the following reasons:

a) In making said reports and orders the Commission failed to consider material evidence of record.

b) The Commission misapplied the law.

c) The conclusion that the rates were unjust and unreasonable is not predicated upon any evidence or finding that rates were unjust and unreasonable in and of themselves with regard to the transportation service rendered.

d) The reports and orders are otherwise arbitrary, capricious and without support in, and contrary to the law and the evidence.

XIV

By reason of the arbitrary and capricious action and the errors of law of the Commission in entering its reports and orders in its Docket 32065, plaintiffs are left without an adequate remedy at law and will be subject to irreparable damage if the relief herein prayed for is not granted.

WHEREFORE, plaintiffs pray that:

1) At final hearing and submission of this case, the court adjudge and determine that the reports and orders

of the Interstate Commerce Commission, appendices A, B, C, and D are unlawful, arbitrary, and capricious, without support in and contrary to the law and evidence;

2) That a decree be entered appropriately enjoining, setting aside and annulling the said reports and orders, and holding that the complaint was barred by the statute of limitations and/or that the rates assessed were not proved to be unreasonable;

3) That the matter be remanded to the Commission for further action not inconsistent with this court's decree; and

4) That plaintiffs have such further relief in the premises as the nature of the case should require and as to this court seems proper.

Respectfully submitted,

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Jacksonville 2, Florida

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DAVID E. WELLS
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Jacksonville 2, Florida

Of Counsel

DATED: August 28, 1961

[Appendices omitted]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

(Title Omitted)

ORDER

ON MAY 8, 1962, this cause came on for hearing on the motion of the Interstate Commerce Commission (ICC) to dismiss the complaint. The Court heard full argument of counsel for the respective parties, and has had the benefit of extensive briefs on the disputed questions.

It is the opinion of the Court that jurisdiction exists in this case. 28 USCA § 1336, 5 USCA § 1009, 49 USCA § 17(9), 28 USCA § 2201; Federal Rule of Civil Procedure 57.

The ICC has urged, as an alternative position to asserted lack of jurisdiction, that the Court should dismiss the complaint in the exercise of its equity discretion. If it is assumed that the motion hinges on this point, then the Court, on the showing which has been made, considers it proper to assume jurisdiction and not to dismiss the complaint.

Upon consideration, it is thereupon,

ORDERED that the motion of the Interstate Commerce Commission to dismiss the complaint be, and the same hereby is, denied.

DONE and ORDERED in Chambers at Jacksonville, Florida, this 15th day of May, 1962.

/s/ Wm. A. McRae, Jr.
Judge

JUDGMENT

(Title Omitted)

In accordance with the Findings of Fact and Conclusions of Law entered herein on January 9, 1963, it is

ORDERED, ADJUDGED AND DECREED that the reports and orders of the Interstate Commerce Commission in *Thompson Phosphate Company* v. *Atlantic Coast Line Railroad Company, et al*, No. 32065, are unlawful and are hereby set aside.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of January, 1963.

Original signed:
WM. A. MCRAE, JR.
Judge

Copies to all counsel

FINDINGS OF FACT

(Title Omitted)

1. This action, filed September 6, 1961, seeks review of a reparation order of the Interstate Commerce Commission in Docket 32065, *Thomson Phosphate Co.* v. *Atlantic Coast Line Railroad Company, et al*, 303 I.C.C. 25, 311 I.C.C. 315. The complaint before the Interstate Commerce Commission was filed on October 16, 1956. It alleged that the rates assessed on ground phosphate rock were unjust and unreasonable to the extent that they exceeded 75% of certain rates on fertilizer materials.

The shipments of phosphate rock (about 636 in number) were from Prairie, Florida, to more than 100 destinations in Illinois during the period April 1945 through December 1950, as tabulated in Appendix A, 311 I.C.C. 315, 318.

The amount involved is $8,889.76 with interest at 4% per annum from the dates the charges were collected. All of the shipments were made and the charges were paid between April 10, 1945, and December 31, 1950; the accrued interest and principal accordingly may reach $15,000.

The Railroads contended that the assessed rates were not unreasonable, and further contended:

(a) That Thomson was barred by the 2-year statute of limitations in § 16(3) of the Interstate Commerce Act, 49 U.S.C. § 16(3), because the shipments all moved prior to December 31, 1950, and the complaint was not filed until October 16, 1956;

(b) That Thomson and the Commission had failed to observe the requirements of Commission Rule of Practice 25(f) and thus failed to stay the Statute of Limitations (Rule 25 is attached hereto as an appendix);

(c) That the Informal Complaint 174417, filed March 20, 1946, which Thomson and the Commission relied upon to stay the Statute of Limitations [§ 16(3)(b)], did not

satisfy the Commission Rule of Practice 25(b) in that it did not include the proper details regarding shipments;

(d) That the Formal Complaint, filed October 16, 1956, did not satisfy Commission Rule of Practice 29 and thus did not stay the Statute of Limitations;

(e) That likewise it did not satisfy Rule 17(b) regarding signing and verification by an executive officer;

(f) That Thomson had sold its interest in all claims on shipments moved prior to January 1, 1948, and thus had no right to claim reparations;

(g) That Thomson did not pay or bear the freight charges and thus was not entitled to recover in any event;

(h) That Thomson, a corporation, was dissolved in September 1951 and, accordingly, could not therefore file an action or institute formal proceedings before the Interstate Commerce Commission in October 1956;

(i) That it was error to award reparations at all; and further that it was error to award interest for all this period of time in which a complaint sat back for over 10 years as to some shipments before taking formal action.

2. The matter was handled in 1957 by the Commission, by affidavits, under Modified Procedure. Hearing for cross examination of complainant's witnesses took place May 29, 1957.

Thereafter, the Examiner of the Interstate Commerce Commission issued his report in August 1957 and found that the claims were barred by the Statute of Limitations.

On February 10, 1958, a Division of the Commission issued a report (303 I.C.C. 25) ruling against the Railroads on all points discussed and completely disregarding others. A petition for reconsideration was filed by the Railroads and was denied by Commission order of July 23, 1958.

The Railroads refused to certify the amount of reparations due, and the matter was referred to an Examiner for a further hearing which took place April 27, 1959. After further procedings, a second report of a Division of the Commission was issued September 28, 1960 (311

I.C.C. 315). This report was adverse to the Railroads, but of the three Commissioners, Commissioner Walrath dissented and stated that the claims were barred by § 16(3). A petition for reconsideration was filed and denied by order of May 23, 1961. Thus, at no time did the full Interstate Commerce Commission ever actually review this case.

Oral argument before the Commission was requested in three separate pleadings and in each instance was denied.

3. Although the Railroads had the alternative of forcing Thomson to file suit to enforce the ICC order, it was felt that the procedural issue involved in the case justified taking the initiative in order to be sure of Court review of the alleged errors. Complaint was filed with this Court August 28, 1961. The ICC filed answer January 5, 1962. The United States answered on January 12, 1962, indicating that it would not participate in the defense.

4. The Interstate Commerce Commission filed a motion to dismiss, contending that the Railroad plaintiffs had no right to seek this review but had to wait for Thomson to file a court action to enforce the Commission order of reparation. This issue was separately briefed and argued in May 1962, and the motion was denied by order of May 15, 1962, in which it was held that the action was proper and that this Court had jurisdiction.

5. An Informal Complaint No. 174417 was filed by Thomson on March 20, 1946, pursuant to Interstate Commerce Commission Rule 25. It sought reparations on shipments "during the past two years" and did not specify a single shipment by any identifiable reference.

6. Thomson and the ICC rely on this Informal Complaint as having stayed the 2-year Statute of Limitations contained in § 16(3(b) of the Interstate Commerce Act, 49 U.S.C. § 16(2), so as to permit the filing of Docket 32065 here under review.

7. On December 4, 1947, over twenty months later, Thomson advised the ICC that Informal Complaint No. 174417 was to cover shipments "during the pendency of this proceeding".

8. On December 17, 1947, the Railroads offered to pay reparations in Informal Complaint No. 174417 "on all shipments involved in this informal complaint upon which the statute of limitations has not run".

9. This proposal was accepted by Thomson, without qualification, in January 1948, and a Special Docket application, No. 218792, was prepared and filed with the ICC. The ICC issued an order September 19, 1950, authorizing the payment to Thomson of $13,071.98, which was paid to Thomson November 17, 1950. This was pursuant to ICC Rule 25(e).

10. Thomson received and cashed the check for $13,071.98 and then on December 7, 1950, asked for additional reparations on a different basis. The Railroads repeatedly refused payment and stated that they had paid and had settled Informal Complaint 174417.

11. On July 20, 1951, however, the ICC advised that in its "informal view" Informal Complaint 174417 was still open for further claims. The Railroads thereafter took the position that they would pay no further claims, and after being requested by the Railroads several times the ICC finally advised Thomson on June 26, 1952, that it would have to comply with Rule 25(f) if it desired to pursue the matter.

12. The ICC Hearing Examiner in his report of August 1957 found Docket 32065 barred by the payment to Thomson of $13,071.98 in 1950, saying:

> "A study of the situation on September 19, 1950, leads only to the conclusion that the informal complaint had been satisfied and that no further complaint was pending.
>
> ". . . Rule 25(f) provides for notice to the parties only when an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant. None of those conditions prevailed here. There is no rule which in any way tolls the statute when as in this instance an informal complaint is closed by special docket approval after a compromise has been reached. The Commission is empowered to make such general rules

as may be requisite for the order and regulation of proceedings before it and conduct its proceedings to best conduce to the proper dispatch of business and to the ends of justice, but the limitation provided by section 16(3) is jurisdictional and cannot be waived by the Commission or its staff. *Phillips* v. *Grand Trunk Ry.*, 236 U.S. 662. Nor do the ends of justice appear to require waiver of established principles of contract law that an offer in compromise when accepted results in a contract binding upon both parties, or that one cannot accept money offered in full settlement of a disputed claim and reject the conditions on which it is offered. *Yazoo & M.V.R. Co.* v. *Webb*, 64 Fed. (2d) 902."

13. Thomson filed a formal complaint in the fall of 1952 on some shipments allegedly also covered by Informal Complaint 174417 and, after a nominally contested proceeding before the ICC, was paid $1,463.80 in 1955 by check reading "payment in full of all matters in Informal Complaint 174417". The Railroads were justified in considering that this had entirely closed out the matter.

14. Nevertheless, by letter of December 19, 1952, Thomson requested reopening of Informal Complaint 174417. This letter was not supplied to the Railroads until March 21, 1956. It contained no additional facts relating to Informal Complaint 174417, yet the ICC perfunctorily reopened the Informal Complaint by letter of December 24, 1952, stating that Informal Complaint 174414 (sic) was reopened "as originally filed".

15. The effect of this letter, if the obvious error in docket number is disregarded, can at most be to reopen Informal Complaint 174417 on shipments only during the two years prior to March 14, 1946, which is the way the Informal Complaint was originally filed.

16. Again Thomson revived the matter by correspondence to the Railroads and the ICC in October 1955, after being paid the $1,463.80. After many denials of responsibility by the Railroads, the ICC finally on March 29, 1956, advised Thomson:

". . . we are again declining the complaint and directing your attention to the provisions of Rule 25(f) of our Rules of Practice."

17. On March 31, 1956, Thomson again wrote the ICC without any additional facts as required by Rule 25(f), and it requested reopening of Informal Complaint 174417; this was perfunctorily done by a subordinate Commission staff member. Again the Railroads said the matter was closed, yet the Commission staff member chose to argue the matter before finally on April 19, 1956, "again declining" to Informal Complaint and referring to Rule 25(f).

18. Docket 32065 was filed October 16, 1956, within six months after the letter of April 19, 1956, but more than six months after the letter of March 29, 1956. Thus Informal Complaint 174417 had to remain alive until April 19, 1956, if any claims survived the 2-year limitation period of 49 U.S.C. § 16(3)(b).

19. The complaint in Docket 32065 was one page in length which, even though filed years after the shipments moved, merely referred to Informal Complaint 174417 and failed to specify a single shipment; however, it took the ICC eight pages of small type to tabulate the shipments in its report at 311 I.C.C. 315, 318-27.

20. The complaint in 1956 was not signed and verified by an executive officer of Thomson as required by ICC Rule 17(b).

21. The complainant, Thomson Phosphate Co., an Illinois corporation, was sold to International Minerals and Chemicals Corp. in 1951, and was legally dissolved in 1951; nevertheless, this complaint was not filed until 1956. Illinois Law (Smith-Hurd Ill. Anno. Stat. ch. 32, § 157.94) requires that an "action or other proceeding" be commenced in two years.

22. The contract of sale of Thomson to I.M.&C. specifically reserved to Thomson the freight charge claims on shipments only between January 1, 1948, and December 31, 1950, yet Thomson seeks in 32065 to recover on shipments back to 1945. The ICC failed to apply the language

of its letter of December 24, 1952, reopening Informal Complaint 174417 "as originally filed" which only covered shipments prior to March 14, 1946.

23. Thomson was merely a broker of phosphate rock in Illinois. It never did own, mine, manufacture, store, or even touch the product. Thomson first made sales and then ordered shipment by I.M. & C., which actually paid the Railroads' freight charges. Thomson billed the receiver with all costs, specifically itemizing freight charges; it thereafter collected and paid I.M. & C. If Thomson recovers here, it will have collected part of the freight charges twice, and it will have a windfall over ten years after the corporation was dissolved.

24. The shipments here went to many different locations (over 100) in Illinois to farmers for direct application to the soil as fertilizer, whereas the material in the cases relied on by Thomson went to chemical companies at a few points.

25. The record shows no plausible or defensible reason for Thomson handling its claims in such a piecemeal, dilatory way, that has resulted in this litigation being dragged out for more than a decade.

CONCLUSIONS OF LAW

1. This action arises under, the United States is made a defendant herein in accordance with, and the jurisdiction of this court rests upon 5 U.S.C. § 1009, 28 U.S.C. §§ 1336, 1398 and 2201, and § 17(9) of the Interstate Commerce Act, 49 U.S.C. § 17(9), and F.R.C.P. 57.

2. This action is properly reviewable by a one-judge District Court instead of a three-judge Court because it involves an order for the payment of money. *Pennsylvania R.R.* v. *United States*, 363 U.S. 202, 205.

3. Venue exists under 28 U.S.C. § 1398 because Plaintiff Atlantic Coast Line Railroad Company is a corporation under the laws of Virginia, having its principal office at Jacksonville, Florida.

4. Section 16(3)(b) of the Interstate Commerce Act [49 U.S.C. § 16(3)(b)] destroys the right as well as the

remedy, and it must be strictly construed. It is jurisdictional and limits the power of the Interstate Commerce Commission to consider a complaint. [See annotations under 49 U.S.C. § 16(3)]. Accordingly, the Commission Rule 25 must also be strictly construed in this case.

5. The payment of $13,071.98 to Thomson in November 1950, pursuant to order of the ICC in Special Docket 218792, terminated Informal Complaint 174417 as provided in ICC Rule 25(e). Therefore, it was not necessary that any further action be taken, or advice be given, by the ICC to terminate the Informal Complaint under Rule 25(f), which only requires further action—

> "If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission."

Established principles of contract law regarding compromise and settlement also require the conclusion that Informal Complaint 174417 was closed out. *Y. & M. V. R. R.* v. *Webb*, 64 F.2d 902.

Accordingly, Docket 32065, filed in 1956 and covering shipments in 1950 and prior years, was barred by 49 U.S.C. § 16(3)(b), and Informal Complaint 174417 cannot be relied upon to stay the running of the 2-year limitation period.

6. The letter of December 19, 1952, from Thomson to the ICC did not contain the "additional fact basis" required by ICC Rule 25(f), and the letter of the Commission Acting Secretary dated December 24, 1952, improperly reopened Informal Complaint 174417. See *Mente & Co., Inc.* v. *C. of Ga. Ry.*, 296 I.C.C. 21; *Domestic Coke Corp.* v. *B & O.*, 168 I.C.C. 53; *Carpenter Paper Co.* v. *C. & A. R. Co.*, 171 I.C.C. 783; *South Chester Tube Co.* v. *Reading Co.*, 181 I.C.C. 613. Thus, the present Docket 32065 is also barred because Informal Complaint 174417 could not have been reopened by the ICC under Rule 25(f).

7. Thomson is likewise barred by its acceptance of the check in 1955 representing "payment in full of all matters in Informal Complaint 174417". This terminated and compromised whatever might then have been left of Informal Complaint 174417, and it could no longer stay the Statute of Limitations contained in 49 U.S.C. § 16(3)(b).

8. Additionally, Docket 32065 is barred because it was not filed within six months of the ICC letter of March 29, 1956, which declined Informal Complaint 174417. The subsequent reopening and declination on April 19, 1956, did not comply with ICC Rule 25(f) because no additional facts were submitted.

9. Although the decision of the Court is not necessarily based upon this conclusion, it is nevertheless the opinion of the Court that the complaint in Docket 32065 did not stop the running of the statute of limitations because it did not comply with ICC Rules of Practice 17(b), 25(b) and 29, which require the signing and verification by an executive officer of Thomson and that formal complaints supply the data required of informal complaints by Rule 25(b). From this conclusion, it would follow that all shipments covered by 32065 are now barred.

10. Likewise, it appears to the Court that the Informal Complaint 174417, filed in 1946, fails to satisfy Rule 25(b), and thus all shipments allegedly covered thereby are barred by 49 U.S.C. § 16(3). See *Thurston Chemical Co.* v. *A.C.L.*, 291 I.C.C. 357, 358; *N. A. Smelting Co.* v. *B&O*, 309 I.C.C. 619; *American Stores* v. *A.C. & Y.*, 310 I.C.C. 127; *Texas Gas Trans. Corp.* v. *A. & S. R.*, 310 I.C.C. 207, 208.

11. In view of the above conclusions of law which have been reached by the Court, it is unnecessary to consider:

(a) Whether or not Thomson could bring a suit in 1956, since it was an Illinois corporation dissolved in 1951.

(b) Whether or not Thomson's sale to I. M. & C. affected its rights to reparations.

(c) The reasonableness *vel non* of the rates involved.
(d) All other questions raised by the record and not specifically disposed of herein.

12. The reports of the Interstate Commerce Commission in Docket 32065, *Thomson Phosphate Co.* v. *A.C.L.*, 303 I.C.C. 25, 311 I.C.C. 315, and the related orders of September 28, 1960 and July 13, 1961 are unlawful. A judgment should accordingly be entered enjoining, setting aside, and annulling said reports and orders and holding that the complaint in 32065 was barred by the statute of limitations, 49 U.S.C. § 16(3)(b).

13. Judgment will be entered in accordance with the present Findings of Fact and Conclusions of Law.

DATED this 9th day of January, 1963.

Original signed:
WM. A. MCRAE, JR.
Judge

APPENDIX

Interstate Commerce Commission Rule 25 (49 C.F.R. 1.25) reads:

"§ 1.25 *Informal complaints seeking damages—*

(a) *Actual filing required.* Notification to the Commission that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute except as provided in paragraph (e) of this section.

(b) *Content.* An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) that complainant makes claim for damages, (2) the name of each individual claimant seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant.

(c) *Statement of prior claim.* If a complaint filed under paragraph (b) or (e) of this section contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint must be given.

(d) *Copies.* The original of an informal complaint seeking damages must be accompanied by copies in sufficient number to enable the Commission to transmit one to each defendant named.

(e) *Special-docket proceedings.* Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) *Six months' rule.* If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within six months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional fact basis.

Such filing or resubmission will be deemed to relate back to the date of the original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted, or included in a formal complaint, as provided in this section, complainant will be deemed to have abandoned the complaint and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period."

NOTICE OF APPEAL

(Title Omitted)

The Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby takes an appeal from the judgment of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on January 9, 1963, in the above-entitled action in favor of the plaintiffs and against the defendants, to the United States Court of Appeals for the Fifth Circuit. The Interstate Commerce Commission further appeals from the order of the United States District Court for the Middle District of Florida, Jacksonville Division, entered on May 15, 1962, denying the Commission's motion to dismiss the complaint, to the United States Court of Appeals for the Fifth Circuit.

Pursuant to Rule 73(b) of the Federal Rules of Civil Procedure the clerk is requested to inform the parties of record of this appeal.

Dated this 8th day of March, 1963.

Respectfully submitted,

LEONARD S. GOODMAN
Attorney
Interstate Commerce Commission
Washington 16, D. C.

ROBERT W. GINNANE
General Counsel

Attorneys for the Interstate Commerce Commission

Law Offices
of
HARRY TEICHNER

66 Court Street
Brooklyn 1, N. Y.

August 23, 1962

Leonard S. Goodman, Esq., Attorney,
Interstate Commerce Commission,
Office of the General Counsel,
Washington 25, D. C.

Re: Atlantic Coast Line R. Co. et al.
v. United States of America and
Interstate Commerce Commission,
Civil Action No. 4771-Civ-J
(G. C. File No. 1714)

Dear Mr. Goodman:

I wish to acknowledge with thanks receipt of copy of your brief in the above matter.

Please be advised that the complaint of Thomson Phosphate Company in a section 16(2) suit was filed in the United States District Court for the Southern District of New York on August 22, 1962. A copy of said complaint is enclosed herewith.

When the above-entitled case has been decided I would appreciate advice from you as to the result, and if it is possible to obtain an extra copy of the Court's opinion please furnish me with same. I shall keep you informed with respect to the progress of the section 16(2) suit.

Respectfully yours

/s/ Harry Teichner
HARRY TIECHNER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action File No. 62-2911

COMPLAINT

THOMSON PHOSPHATE COMPANY, PLAINTIFF

v.

ATLANTIC COAST LINE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, ALTON AND SOUTHERN RAILROAD, ATLANTA, BIRMINGHAM AND COAST RAILROAD, THE BALTIMORE AND OHIO RAILROAD COMPANY, CENTRAL OF GEORGIA RAILWAY COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY, CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, GEORGIA & FLORIDA RAILROAD (ALFRED W. JONES, RECEIVER), GEORGIA RAILROAD by lessees: ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, GULF, MOBILE AND OHIO RAILROAD COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, NORFOLK AND WESTERN RAILWAY COMPANY, NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, PADUCAH & ILLINOIS RAILROAD COMPANY, SAVANNAH & ATLANTA RAILWAY COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, TOLEDO, PEORIA & WESTERN RAILROAD, THE VIRGINIAN RAILWAY COMPANY, WABASH RAILROAD COMPANY,
DEFENDANTS

The plaintiff, by HARRY TEICHNER, ESQ., its attorney, complaining of the defendants, respectfully alleges:—

FIRST: That at all the times hereinafter mentioned, and prior to September 24, 1951, the plaintiff was a corporation duly organized and existing under the laws of the State of Illinois.

SECOND: That on September 24, 1951 the plaintiff corporation was dissolved by the issuance of a certificate of dissolution by the Secretary of State of the State of Illinois.

THIRD: That pursuant to the laws of the State of Illinois this action is maintainable in the name of the plaintiff corporation.

FOURTH: Upon information and belief, that at all the times hereinafter mentioned the defendant ATLANTIC COAST LINE RAILROAD COMPANY, was and now is a corporation duly organized and existing under the laws of the State of Virginia, having its principal operating office at Jacksonville, Florida.

FIFTH: Upon information and belief, that at all the times hereinafter mentioned, the defendant THE NEW YORK CENTRAL RAILROAD COMPANY was and now is a corporation duly organized and existing under the laws of the State of New York, having its principal operating office in the City, County and State of New York.

SIXTH: Upon information and belief, that at all times hereinafter mentioned ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE AND NASHVILLE RAILROAD COMPANY were and now are lessees of the above-named GEORGIA RAILROAD; that said GEORGIA RAILROAD was and now is an organization not a corporation, but represents said ATLANTIC COAST LINE RAILROAD COMPANY and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, as lessees of the railroad property of the GEORGIA RAILROAD & BANKING COMPANY whose properties are known as the GEORGIA RAILROAD.

SEVENTH: Upon information and belief, that at all times hereinafter mentioned, the other defendants above-named were and now are corporations; that ALFRED W. JONES since June 1, 1948 was and now is the receiver of the above-named GEORGIA & FLORIDA RAILROAD.

EIGHTH: That at all the times hereinafter mentioned, the defendants were and now are common carriers by railroad, engaged in the interstate transportation of freight, and as such common carriers are subject to the provisions of the Interstate Commerce Act, and acts amendatory thereof, and supplemental thereto.

NINTH: That the roads of the defendant THE NEW YORK CENTRAL RAILROAD COMPANY run through the Southern District of New York.

TENTH: That the roads of the defendant THE PENNSYLVANIA RAILROAD COMPANY run through the Southern District of New York.

ELEVENTH: That the roads of the defendant ATLANTIC COAST LINE RAILROAD COMPANY run through the Southern District of New York.

TWELFTH: That on and between April 11, 1945 and October 21, 1950, inclusive, plaintiff made numerous shipments of ground phosphate rock, in carloads, which moved from Prairie, Florida, to destinations in Illinois over the lines of the defendant ATLANTIC COAST LINE RAILROAD COMPANY, as originating carrier, and the lines of the other defendants above named, as participating and connecting carriers, on which plaintiff paid to the defendant ATLANTIC COAST LINE RAILROAD COMPANY, and bore transportation charges at rates ranging from $6.90 to $10.26 per ton of 2240 pounds; that said payments were received by said defendant ATLANTIC COAST LINE RAILROAD COMPANY from plaintiff and were divided among the defendant carriers participating in the transportation.

THIRTEENTH: That said rates and charges for such transportation were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act.

FOURTEENTH: That the reasonable and lawful rates and charges for the transportation of said shipments should have been 75 percent of the rates on fertilizer materials on the basis approved in the proceeding before the Interstate Commerce Commission entitled *Fertilizer Between Official and Southern Territories* and reported in 232 I.C.C. 301, extended to include distances from Barstow, Florida, and increased as subsequently authorized for application on phosphate rock when the shipments moved. Reference to said report in 232 I.C.C. 301 is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

FIFTEENTH: That by reason of the foregoing, the plaintiff has been subjected to the payment of rates and charges for transportation, which were when exacted unjust, unreasonable, unlawful and excessive in violation of Section 1 of the Interstate Commerce Act, and plaintiff has been damaged thereby in the sum of $8,889.76 with interest thereon from the respective dates of payment of the charges, said sum of $8,889.76 represents the amount of the difference between the charges paid and those that would have accrued at just and reasonable rates.

SIXTEENTH: That on or about October 16, 1956 plaintiff duly filed a formal complaint with the Interstate Commerce Commission (hereinafter called the Commission), wherein the plaintiff herein was designated as the complainant, and the defendants herein were designated as defendants, alleging the aforesaid violations of the Interstate Commerce Act and praying that plaintiff be awarded reparation for the damage it sustained thereby.

SEVENTEENTH: That after hearing the said case, hearing I.C.C. Docket No. 32065, the Commission made its report on February 10, 1958, finding that the rates assailed were unjust and unreasonable to the extent that they exceeded 75 percent of the rates on fertilizer materials on the basis approved in *Fertilizer Between Official and Southern Territories*, 232 I.C.C. 301, extended to

include distances from Barstow, Florida, and increased as subsequently authorized for application on phosphate rock when the shipments moved; and further finding that plaintiff made the shipments, and paid and bore the charges thereon at rates found in said report to have been unjust and unreasonable; that plaintiff was damaged thereby in the amount of the difference between the charges paid and those which would have accrued at the rates found in said report to have been just and reasonable, and is entitled to reparation with interest; and that plaintiff should comply with rule 1.100 of the General Rules of Practice of the Interstate Commerce Commission. That said report appears in 303 Interstate Commerce Commission Reports 25, reference to which report is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

EIGHTEENTH: That a petition by the defendants for reconsideration of the findings in said report, 303 I.C.C. 25, was denied by the Commission on July 23, 1958.

NINETEENTH: That statements were filed with the defendants by the plaintiff containing details of the aforesaid shipments, in compliance with the requirements of said rule 1.100 of the General Rules of Practice of the Interstate Commerce Commission, but the defendants declined to certify any of the statements, and upon request of the plaintiff, the proceeding was reopened for further hearing, solely for the purpose of determining the amount of reparation due the plaintiff under the findings in said report, 303 I.C.C. 25.

TWENTIETH: That after such further hearing, a recommended report and order were issued, wherein the Commission examiner found that the plaintiff was entitled to reparation in the total amount of $8,889.76, with interest, on the shipments, of record, listed in appendix A to the report of the Interstate Commerce Commission, 311 I.C.C. 315. Reference to said report in 311 I.C.C.

315 is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action.

TWENTY-FIRST: That subsequently, a petition for leave to file a petition for reconsideration of the findings in the said prior report, 303 I.C.C. 25, filed by the defendants, was denied by the Commission on June 23, 1960.

TWENTY-SECOND: That after said further hearing and the issuance of said recommended report and order by the examiner, the Commission made and entered its report and order on September 28, 1960 finding that the plaintiff is entitled to reparation from the defendants in the amounts set opposite their respective names in appendix C of said report, aggregating $8,889.76, with interest, and directing that the defendants named in appendix A to the report, 311 I.C.C. 315, according as they participated in the transportation, as shown in said appendix C of said report, pay to the plaintiff, on or before December 1, 1960, the sum of $8,889.76 with interest thereon at the rate of 4 percent per annum from the dates the unjust and unreasonable charges were collected, as reparation on account of unjust and unreasonable rates charged for the transportation of 639 carloads of ground phosphate rock from Prairie, Florida, to numerous destinations in Illinois, on and between April 11, 1945 and October 21, 1950, all as described in the aforesaid reports, 303 I.C.C. 25 and 311 I.C.C. 315. That said report made by the Commission on September 28, 1960 appears in 311 I.C.C. 315, and reference thereto is made for greater particularity, and the same is made a part hereof as if set forth at length herein, and plaintiff begs leave to refer to said report on the trial of this action. That a copy of said order made by the Interstate Commerce Commission on September 28, 1960 is annexed hereto, marked Exhibit 1, and made a part of this complaint.

TWENTY-THIRD: That thereafter a petition was filed with the Commission by the defendants for recon-

sideration of the aforesaid reports, 303 I.C.C. 25 and 311 I.C.C. 315, and the aforesaid order, Exhibit 1 hereof, and thereupon the Commission stayed said order pending disposition of the said petition. That thereafter said petition for reconsideration was denied by the Commission on May 23, 1961.

TWENTY-FOURTH: That thereafter and on July 13, 1961 an order was made by the Commission vacating the aforesaid order, dated September 28, 1960, Exhibit 1 hereof, only insofar as it required compliance on or before December 1, 1960, and modifying said order so as to require compliance on or before August 28, 1961, without otherwise changing the requirements of said order. That a copy of said order made on July 13, 1961 is annexed hereto, marked Exhibit 2, and made a part of this complaint.

TWENTY-FIFTH: Upon information and belief, that the aforesaid reports and orders were duly served on the defendants.

TWENTY-SIXTH: That the plaintiff has duly demanded payment of said award of reparation, but the defendants have failed and refused to pay same, or any part thereof.

TWENTY-SEVENTH: That prior to the filing of said formal complaint the aforesaid shipments were the subject of an informal complaint alleging unreasonableness under Section 1 of the Interstate Commerce Act, filed with the Interstate Commerce Commission by the plaintiff against the defendants, on or about May 20, 1946, as amended on or about December 4, 1947; that the defendants having failed to adjust the informal complaint, as amended, the same was closed on or about June 26, 1952, but was thereafter reopened, and it was finally declined and closed by the Commission on April 19, 1956.

TWENTY-EIGHTH: That this suit is instituted by plaintiff against the defendants under the Interstate Commerce Act and the amendments thereof.

WHEREFORE, plaintiff demands judgment against the defendants for the sum of $8,889.76, together with interest thereon from the respective dates of plaintiff's payment of the said charges, together with costs, including a reasonable attorney's fee.

/s/ Harry Teichner
HARRY TEICHNER
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[52] *Minute entry of argument and submission.—April 16, 1964*

[Omitted in printing]

[54] In the United States Court of Appeals for the Fifth Circuit

No. 20485

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO. ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

Opinion—July 8, 1964

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

BROWN, *Circuit Judge:* The question in this case—arising for the first time in the 75-year operation of the Interstate Commerce Act—is whether a carrier may sue to set aside a reparation award of the Commission under § 16(1) by a suit under § 17(9), 28 USCA §§ 1336, 1398, 2321–23, or must confine its challenge as a defense [55] in the Shipper's suit when, where and as brought under § 16(2). The District Court upheld the right. The ICC, joined by an array of shipper interests, spiritedly challenges the holding. We think the attack is unavailing and affirm.

The facts are very simple. In response to the complaint of the Shipper,[1] the ICC awarded reparations in the amount of $8,889.76 with interest, for unjust and unreasonable rates collected for phosphate movements from Florida to Illinois during the period April 10, 1945, to December 31, 1950.[2] The order

*Of the Ninth Circuit, sitting by designation.

[1] Thomson Phosphate Company.

[2] *Thomson Phosphate Co.* v. *Atlantic Coast Line R.R.*, 1953, 291 ICC 1, 1954, 293 ICC 369, 1958, 303 ICC 25. Not surprisingly, one of the Carrier's defenses is that in this long span of years even an impersonal corporate person had expired.

called for payment on or before August 28, 1961, the effective date of compliance, *Missouri Pacific R.* v. *Austin*, 5 Cir., 1961, 292 F. 2d 415, 418–19. On September 6, 1961, the Carrier-appellees filed a suit in the Middle District of Florida, the venue district of Atlantic Coast Line to set aside the order. Long thereafter, on August 22, 1962, the Shipper filed suit against the Carrier and other railroads under § 16(2) in the Southern District of New York for the amount of the award with interest and, of considerable importance here, attorney's fees. The Court below overruled the ICC's motions to dismiss which asserted the exclusive method of review is under § 16(2). Thereafter, on the merits, it held the award and order invalid, primarily because of the statute of limitations. 213 F. Supp. 199.[3]

[56] The ICC asserts that the sole review of an order granting reparations under § 16(1)[4] is that provided in § 16(2).[5]

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[3] By an agreed statement of the case on appeal, F.R. Civ. P. 76, the appeal presents only the question of jurisdiction. No attack is made on the District Court's decision on the merits.

[4] 49 USCA § 16(1):

"If, after hearing on a complaint made as provided in section 13 of this title, the commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

[5] Section 16(2) of the Interstate Commerce Act, 49 USCA § 16(2) provides:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

The Carrier, on the other hand, insists that § 17(9)[6] expressly authorizes "a suit to enforce, enjoin, suspend, or set aside" an order, thus setting in train [57] the jurisdictional-procedural provisions of 28 USCA §§ 1336,[7] 1398,[8] 2321,[9] 2322,[10] and 2323.[11]

The ICC's approach is a dual one. It contends, first, that construction of all of the statutes together manifests a congres-

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[6] 49 USCA § 17(9):

"(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

[7] 28 USCA § 1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

[8] 28 USCA § 1398:

"Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

[9] 28 USCA § 2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

"The orders, writs, and process of the District Courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

[10] 28 USCA § 2322:

"All actions specified in section 2321 of this title shall be brought by or against the United States."

[11] 28 USCA § 2323:

"The Attorney General shall represent the Government in the actions specified in section 2321 of this title * * *.

"The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party. * * *."

sional purpose to restrict review of a reparations award to the Shipper's suit under § 16(2). Next, both as a part of that argument, and independent of it, the ICC further asserts that there is no reviewable final "order" as called for in §§ 17(9), 1336 or 1398.

[58] These arguments stress the non-self-executing aspects of a reparation award. Since they are "for the payment of money," the Carrier is not bound to comply under the imminence of a mandatory injunction suit brought by the ICC or the United States. § 16(12), 49 USCA § 12(12). Emphasizing that § 16(2) provides only that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated," the ICC urges isolated excerpts from early opinions of the Supreme Court to suggest that it is really not an order at all. Thus *Mills* v. *Lehigh Valley R.R.*, 1915, 238 U.S. 473, 482, 35 S. Ct. 888, 59 L. Ed. 1414, had this to say of § 16(2): "The statutory provision merely established a rule of evidence. It leaves every opportunity to the * * * [Carrier] to contest the claim." [12]

[59] But we have no doubt that this award has all of the characteristics of finality so far regarded as essential to court review under statutes comparable to those here involved.

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[12] At the same term the Court stated in *Meeker & Co.* v. *Lehigh Valley R.R.*, 1915, 236 U.S. 412, 430, 35 S. Ct. 328, 59 L. Ed. 644: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents."

Its sweeping assurance of a jury trial and "contestation of all the issues, * * * of fact" must now be read with considerable reservation. All acknowledge that under the doctrine of primary jurisdiction the § 16(2) court may not independently determine the merits of the unjustness or unreasonableness of rates, discriminatory practices, and the like. We may assume, without deciding, that review of such "administrative" matters subject to the expertise of the ICC in a § 16(2) suit is no less than in one under §§ 1336, 1398. It is clear that it is not greater. *New Process Gear Corp.* v. *New York Central R.R.*, 2 Cir., 1957, 250 F. 2d 569, 572, cert. denied, 1958, 356, U.S. 959, 78 S. Ct. 996, 2 L. Ed. 2d 1066, citing *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 1913, 230 U.S. 247, 33 S. Ct. 916, 57 L. Ed. 1472: *Glens Falls Portland C. Co.* v. *Delaware & Hudson Co.*, 2 Cir., 1933, 66 F. 2d 490, cert. denied, 1933, 290 U.S. 697, 54 S. Ct. 132, 78 L. Ed. 599.

Rochester Tel. Corp. v. *United States*, 1939, 307 U.S. 125, 59 S. Ct. 754, 83 L. Ed. 1147; *Columbia Broadcasting System* v. *United States*, 1942, 316 U.S. 407, 62 S. Ct. 1194, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, 1956, 351 U.S. 40, 76 S. Ct. 568, 100 L. Ed. 910; *United States* v. *Storer Broadcasting Co.*, 1956, 351 U.S. 192, 76 S. Ct. 763, 100 L. Ed. 1081; *El Dorado Oil Works* v. *United States*, 1946, 328 U.S. 12, 66 S. Ct. 843, 90 L. Ed. 1053. An award-order is, first, administratively final. Nothing further remains to be done by the ICC. It is not a declaration of consequences dependent on further, future action. Rather, it is positive and presently operative. It declares, first, the violation of the Act (unreasonable, unjust rates, and the like) and then finds the amount of the Shipper's claim. On the two findings, it directs the payment of the award. And as *United States* v. *ICC*, 1949, 337 U.S. 426, 432–33, 69 S. Ct. 1410, 93 L. Ed. 1451, and *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 205, 80 S. Ct. 1131, 4 L. Ed. 2d 1165, made clear, finality for the purposes of review is not to be determined solely by the terms of the order, but by whether such order "if upheld" forecloses a right or imposes an obligation. Assuming that a § 16(2) suit is necessary for the Shipper to coerce payment, the resulting court judgment is to "uphold" the award, to hold it valid. In that judicial result, the administrative proceedings have not in any sense been superseded. The critical finding of a violation of the Act as an essential ingredient to recovery rests wholly [60] and entirely upon the administrative decision of the ICC, not independent court determination, since recovery by the Shipper assumes that the primary jurisdiction aspect has withstood the restricted review, see note 12, *supra*.

Bearing in mind that the problem here is the determination of the statutory mechanism for review in reparation award order cases generally, not merely the machinery which would satisfy this particular case, we perceive additional factors giving final operative effect to the award-order no matter what happened in the Shipper's § 16(2) suit.

An award-order is in two parts, (1) the determination of violation of statutory policies, unjust, unreasonable rates, discriminatory practices, or the like, and (2) specific damage to

the shipper-complainants. So long as element (1) is outstanding and not set aside, it affords the basis for a § 9 suit, 49 USCA § 9, by a shipper similarly situated without his first going through a reparation proceeding. And in *Phillips* v. *Grand Trunk W. Ry.*, 1915, 236 U.S. 662, 35 S. Ct. 444, 59 L. Ed. 774, and many others, the Court has held that a person not a party complainant to a proceeding before the ICC may, on the general finding that the rate was unjust and unreasonable, bring his independent suit in court. Of the administrative finding that the rates were unjust and unreasonable, the Court said the "finding * * * was general in its operation and inured to the benefit of every person that had been obliged to pay the unjust rate. Otherwise those who filed the complaint or [61] intervened during the [Commission] hearing, would have secured an advantage over the general body of the public, with the result that the order of the Commission would have created a preference in favor of the parties to the record and would have destroyed the very uniformity which that body had been organized to secure." 236 U.S. 662, at 665. In addition, there is a substantial indication that in the day-to-day operations of the ICC in the fabrication and building of its own formidable body of transportation law, reparation order-awards announcing principles are regarded as precedents. Thus the opinion reports of the ICC here, note 2, *supra*, until set aside by a direct proceeding, remain outstanding precedents on the question of the statute of limitation notwithstanding the possibility that in the § 16(2) suit in the Southern District of New York a jury might bring in a verdict for the Carrier. Even 100% success in the § 16(2) suit leaves the Carrier faced with unsatisfactory law for all to use and unsatisfactory fact findings for all shippers to use.

Symmetry also suggests a congressional purpose to allow review of an award-order granting reparations under § 17(9). It is unquestioned that if the Commission denies the Shipper's reparation complaint, review may properly be had under §§ 1336, 1398. *Cf. United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. And in a § 9 suit, 49 USCA § 9, the administrative determination of primary jurisdiction elements on a referral to the ICC by a Court is reviewable under

§§ 17(9), 1336, 1398. *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

[62] Against this massive structure of injunctive reviewability, the Commission's thesis comes down to the assertion that Congress meant to allow court review of the grant of an award-order granting reparation only in the shipper's § 16(2) suit. In so doing, stress is laid on the procedural advantages given the shipper—(1) freedom from court costs, (2) attorney's fees if successful, (3) choice of venue, and (4) relief from the burden of making out a prima facie case by introducing in evidence the administrative findings and order. Urged as a fitting, railroad analogy is the statutory mechanism for awards under the Railway Labor Act, 45 USCA §§ 151, 153 First (p). Under this provision, an employee who has obtained an award of the National Railroad Adjustment Board may file suit in the District Court for enforcement if the carrier does not comply with the agency order. The order is prima facie evidence of the facts therein stated. In *New Orleans Public Belt R. Commission* v. *Ward*, 5 Cir., 1950, 182 F. 2d 654, following *Washington Terminal Co.* v. *Boswell*, D.C. Cir., 1941, 124 F. 2d 235, affirmed by an equally divided court, 1943, 319 U.S. 732, 63 S. Ct. 1430, 87 L. Ed. 1694, we held that a carrier could not circumvent this statutory right of the employee by resorting to a declaratory judgment suit.

We think the resemblance is superficial. We would think also that to import into the highly specialized aspects of carrier regulation and the statutory scheme of determination and review especially contrived for it, the cumbersome and frequently difficult distinctions between major and minor, between court decision and [63] Adjustment Board decision, between Adjustment Board and Mediation Board, between Court and Mediation Board will hinder, not help, in achieving judicial review which is clearly guaranteed under the Administrative Procedure Act. 5 USCA §§ 1009, 1001 (d), (f), and (g).

Many reasons may be briefly summarized. The actions of the Railway Adjustment Board are not subject to the Administrative Procedure Act. The provision of 45 USCA § 153 First (p) expressly invests the Court with power to "enter such judgment, by writ of mandamus or otherwise, as may be ap-

propriate to enforce or set aside the order of the * * * Board." At the same time there is no other statutory grant of review as in § 17(9). An Adjustment Board proceeding resulting in a money award carries forward no elements of primary jurisdiction with limited, restricted judicial review. Such an award is open for full review. *Hodges* v. *Atlantic Coast Line R.R.*, 5 Cir., 1962, 310 F. 2d 438. Probably most important, that structure is hardly a model to be copied.[13]

The procedure invoked by the Carrier here is fair and efficient. Brought in the same single Judge District Court [14] in which the Shipper's complaint would be filed [64] complaining of a denial of a § 16(1) reparation award or to review an unsatisfactory finding in a court referral proceeding upon which to base a § 9 suit, there may be a determination once and for all of the underlying validity of the Commission's findings with respect to violations of the Act (unjust, unreasonable rates, discriminatory practices, etc.). If the order *vis-a-vis* the ICC and the Carrier fails to pass muster and is therefore "not in accordance with law," 5 USCA § 1009(e), it may then be set aside. No one, whether Carrier or Shipper, will thereafter be subjected to the expense of useless litigation in numerous courts where separate § 16(2) shipper suits have been filed.

More important, this assures some symmetry in the construction and maintenance of a national transportation policy. In the injunction suit, §§ 17(9), 1336, 1398, the United States and the ICC are parties. The Attorney General and the General Counsel of the Commission are directly and immediately responsible for the conduct of that litigation and the advocative assertion of contentions deemed essential in the public interest. This is all the more essential where, as is quite frequent, there is an outright clash between the executive de-

[13] The dissenting opinions in *Pennsylvania R.R.* v. *Day*, 1959, 360 U.S. 548, 554, 79 S. Ct. 1322, 3 L. Ed. 2d 1422; *Union Pacific R.R.* v. *Price*, 1959, 360 U.S. 601, 617, 79 S. Ct. 1351, 3 L. Ed. 2d 1460, pointing up serious constitutional questions emphasize what they describe as the one-sided nature of judicial review: the employee loses, he has no right of review whatsoever; the employee wins, the carrier loses, the carrier has unlimited review on facts and law.

[14] *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451; *Pennsylvania R.R.* v. *United States*, 1960, 363 U.S. 202, 80 S. Ct. 1131, 4 L. Ed. 2d 1165.

partments of the Government, the Attorney General, and the Commission. See *United States* v. *ICC*, 1949, 337 U.S. 426, 69 S. Ct. 1410, 93 L. Ed. 1451. In contrast, of course, in the Shipper's § 16(2) suit neither the Commission nor the Government is a party. Intervention, whether permissive or as a matter of right, is something less than satisfactory especially with the pendency of a number of shipper suits in a number of juris[65]dictions. Without intervention, the sole spokesman in behalf of the ICC's order is the private party seeking partisan relief opposed by formidable, experienced, competent counsel for the Carrier.

We cannot believe that these important considerations were derailed by Congress out of its statutory desire to accord to a Shipper some procedural benefits. Indeed, with respect to the element of shipper damage, it is entirely too soon to state that a Shipper may not under appropriate circumstances obtain the benefit of all, or a part, of these statutory advantages by intervening in the injunction proceeding. And considering the great flexibility open to an equity court, the conclusion reached here that an injunction suit may be maintained by the Carrier does not force that Court to take on the adjudication of all of the damage element claims of numerous shippers. Wide latitude would be allowed to fashion appropriate, preliminary machinery by which shipper suits could be filed in appropriate venue districts and stayed pending ultimate determination of the injunction proceeding. A decree sustaining basic validity would likely leave for the individual § 16(2) suits only the limited issue of money damage, presumably a relatively simple matter for court or jury determination with the Shipper armed, as he is, with the working presumption from the prima facie case.

The District Court was, therefore, correct in overruling the motion to dismiss, in sustaining the right of judicial review in that Court under §§ 1336, 1398, and in [66] rejecting the contention that review had to be in the § 16(2) suit pending in New York.[15]

Affirmed.

[15] The ICC's contention that the trial court, having jurisdiction, should nevertheless have declined to exercise it for equitable considerations is without merit.

[67] In the United States Court of Appeals
for the Fifth Circuit

October Term, 1963

No. 20485

D.C. Docket No. 4771-Civil-J

INTERSTATE COMMERCE COMMISSION, APPELLANT

versus

ATLANTIC COAST LINE R. CO. ET AL., APPELLEES

Appeal from the United States District Court for the Middle District of Florida

Before TUTTLE, Chief Judge, and POPE* and BROWN, Circuit Judges

Judgment—July 8, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

JULY 8, 1964.

Issued as Mandate: July 30, 1964.

[68] [Clerk's certificate to foregoing transcript omitted in printing]

*Of the Ninth Circuit, sitting by designation.

[69] Supreme Court of the United States

October Term, 1964

No. ——

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

ATLANTIC COAST LINE R. CO. ET AL.

Order extending time to file petition for writ of certiorari—October 6, 1964

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 20, 1964.

HUGO L. BLACK,
Associate Justice of the Supreme Court of the United States.

Dated this 6th day of October 1964.

[70] Supreme Court of the United States

October Term, 1964

No. 606

INTERSTATE COMMERCE COMMISSION, PETITIONER

vs.

ATLANTIC COAST LINE R. CO. ET AL.

Order allowing certiorari—January 18, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.